85-630

No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

J. WYATT GRIMMER, WILLIAM T. THORNTON, MARJORIE C. KIRKLAND, ROBERT M. PAUL,

Petitioners,

v.

T. DEWEY HARDEN, JR.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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September 20, 1985

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QUESTIONS PRESENTED

I. IS THE DECISION OF THE ELEVENTH CIRCUIT IN CONFLICT WITH THE DECISION OF THIS COURT IN *HARLOW v. FITZGERALD* AND THE DECISIONS OF THE FEDERAL COURTS OF APPEAL WHICH REQUIRE THE PLAINTIFF TO PROVE THAT THE DEFENDANTS' ACTIONS VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL OR STATUTORY LAW?

II. DOES THE DECISION OF THE ELEVENTH CIRCUIT VIOLATE ITS OWN ORDER BY BASING ITS DECISION ON ISSUES NOT ARGUED IN RESPONDENT'S BRIEF?

LIST OF ALL PARTIES

T. DEWEY HARDEN, JR.
TROY STATE UNIVERSITY

RALPH W. ADAMS

ROBERT M. PAUL

J. WYATT GRIMMER

WILLLIAM T. THORNTON

MARJORIE C. KIRKLAND

FOB JAMES

WAYNE TEAGUE

WALLACE D. MALONE

HAROLD COLLINS

DOUGLAS HAWKINS

ROBERT E. KELLY

JACK W. WALLACE

JOHN A. TEAGUE

C. J. HARTLEY

ROBERT T. WILSON

GEORGE C. WALLACE

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IN THE
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No._____

J. WYATT GRIMMER, WILLIAM T. THORNTON, MARJORIE C. KIRKLAND & ROBERT M. PAUL,

Petitioners,

v.

T. DEWEY HARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Dr. J. Wyatt Grimmer, Dr. William T. Thornton, Dr. Marjorie C. Kirkland and Mr. Robert M. Paul respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on May 20, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as *Harden v. Adams*, 760 F. 2d 1158 (11th Cir. 1985), appears in the Appendix hereto along with the separate judgment of that court. The orders and opinions of the District Court for the Middle District of Alabama bearing the caption *Harden v. Paul* are also included in the Appendix. The district court's orders were appealed to and reversed in part by the Eleventh Circuit.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Eleventh Circuit were entered on May 20, 1985. A timely petition for rehearing *en banc* was denied on June 25, 1985, and a copy of such order is also included in the Appendix. This Petition for Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 1983 of Title 42 of the United States Code provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.* * *

Section 14 of the Constitution of the State of Alabama provides:

> The State of Alabama shall never be made a defendant in any court of law or equity.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Respondent, a former tenured teacher at Troy State University Dothan/Ft. Rucker was notified in writing on May 6, 1982, of his proposed termination from the faculty effective June 30, 1982, which he was advised was subject to his right to an administrative hearing as provided in the Faculty Handbook. Following a hearing before the Faculty Personnel Advisory Committee spanning 23 days at which 55 hours of sworn testimony was presented by both sides, and at which his dismissal was affirmed on the basis of the evidence presented, respondent brought suit in the United States District Court for the Middle District of Alabama claiming violation of his rights to freedom of expression and due process under 42 U.S.C. Section 1983. The district court entered summary judgments for each of the defendants on all grounds. The Eleventh Circuit reversed as to the petitioners in their individual capacity only, affirming as to all defendants in their representative capacity and as to the remaining defendants individually.

II. STATEMENT OF RELEVANT FACTS

The petitioners, administrators at Troy State University Dothan/Ft. Rucker, received a written complaint from the respondent's immediate superior on the university faculty, Dr. I. R. Swords, Head of the Department of Counseling and Human Development, concerning derogatory and unprofessional comments made about him by respondent in the presence of several students (R 537). Respondent had previously been relieved of part of his duties on the faculty due to insubordination. As a result of numerous complaints and problems the administration had with the respondent, including unprofessional actions and insubordination, he was notified of his proposed dismissal from the faculty of the university on May 6, 1982, which would not become effective until almost two months later on June 30, 1982, subject to his right to an administrative hearing which he subsequently requested (R 21-22). Respondent was given June 30, 1982, as the effective date of his proposed termination since that was the last day of the academic year for the entire faculty, including respondent. Respondent was not entitled to any salary or other benefits

from June 30, 1982, until the beginning of the fall quarter in September, 1982.

Respondent was advised that his administrative hearing before the Faculty Personnel Advisory Committee would be held on June 30, 1982 (R 546). He was also notified of the names of the members of the Committee (R. 547-548). Shortly before the date of the hearing, the respondent requested that his administrative hearing be rescheduled for July 7, 1982, which was granted (R. 549). From July 7 through July 29, 1982, the Committee heard approximately 55 hours of sworn testimony concerning the reasons for his proposed termination with documents presented from both parties. Respondent was represented by his attorney and a representative of the Alabama Education Association, called witnesses in his own behalf and cross-examined the petitioners' witnesses (R. 269-270, 272, 273, 289, 359-360, 478-479, 502). After receipt of the Committee's written decision supporting the University's determination, the respondent was notified in writing on August 31, 1982, prior to the beginning of the fall term, that his termination was final (R. 550-552).

III. PROCEEDINGS BELOW

On June 17, 1982, respondent filed a one-count complaint in the district court seeking both damages and equitable relief (R. 13-19). Respondent's equitable claim, which sought an injunction enjoining the petitioners from terminating him, was set for hearing on July 12, 1982 (R. 25) but was continued at the request of the respondent (R. 34). Respondent did not thereafter request a hearing on his injunctive relief and it was dropped. Respondent's damage claim, which sought both compensatory and punitive damages, was premised on two grounds: the violation of his right to freedom of expression and to substantive due process, actionable under 42 U.S.C. Section 1983. The district court granted summary judgment for the petitioners after consideration of numerous affidavits, exhibits and briefs submitted by the petitioners and an affidavit submitted by the respondent.

On appeal, the Eleventh Circuit affirmed the district court as to all defendants in their official capacity and as to all defendants except petitioners in their individual capacity. The Eleventh Circuit reversed as to petitioners individually on the basis of its determination that there was a genuine issue of fact because of a poten-

tial of a violation of respondent's right to freedom of expression and because he had claimed a violation of his right to due process. On the basis of this finding, the Eleventh Circuit reversed and remanded in part.

REASONS FOR GRANTING THE WRIT

I. IS THE DECISION OF THE ELEVENTH CIRCUIT IN CONFLICT WITH THE DECISION OF THIS COURT IN *HARLOW v. FITZGERALD* AND THE DECISIONS OF THE FEDERAL COURTS OF APPEAL WHICH REQUIRE THE PLAINTIFF TO PROVE THAT THE DEFENDANTS' ACTIONS VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL OR STATUTORY LAW?

In his complaint, respondent alleged that his First Amendment right to freedom of expression had been violated in connection with his termination from the faculty of Troy State University Dothan/Ft. Rucker and that his right to substantive due process had been violated in that he was afforded a post-decision rather that a pre-determination hearing.

The decision of the Eleventh Circuit reversed the district court's specific finding that the petitioners' conduct was reasonable and did not violate any clearly established statutory or constitutional right of which a reasonable person would know. In making that finding the district court specifically noted that respondent had offered no proof in response to the petitioners' motions for summary judgment that any of his constitutional or statutory rights had been violated by petitioners. The Eleventh Circuit's opinion, plainly and simply, is in direct conflict with its own previous decisions and the decisions of the Fifth Circuit Court of Appeals and this Court.

In order to establish their entitlement to qualified immunity, the petitioners were required to do two things: (1) affirmatively plead qualified immunity as a defense and (2) establish that their actions were undertaken pursuant to the exercise of their discretionary authority. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Douthit v. Jones,* 619 F. 2d

527 (5th Cir. 1980). Petitioners raised the bar of the Eleventh Amendment and qualified immunity as affirmative defenses (R. 44-46, 52-53), and each of the petitioners established without question that their actions in the proposed termination of the respondent were within the scope of their discretionary authority (R. 209-265, 268-284, 287-290, 472-564). In fact, the respondent never mentioned nor did he attempt to rebut in any manner this evidence offered by petitioners.

At that point, without any contradiction on the part of the respondent, the petitioners were absolutely entitled to qualified immunity. *Harlow v. Fitzgerald*, supra; *Douthit v. Jones*, supra. As the Fifth Circuit and other circuit courts have repeatedly held, the burden then shifts to the respondent to rebut this qualified immunity defense. *Garris v. Rowland*, 678 F. 2d 1264, 1271 (5th Cir. 1982); *Rheaume v. Texas Department of Public Safety*, 666 F. 2d 925, 930 (5th Cir. 1982); *United Carolina Bank v. Board of Regents*, 665 F. 2d 553, 562 (5th Cir. 1982); *Barker v. Norman*, 651 F. 2d 1107, 1120 (5th Cir. 1981). As the Fifth Circuit stated on this point in *Saldana v. Garza*, 684 F. 2d 1159 (5th Cir. 1982): "In order to break the qualified immunity defense, the plaintiff must establish that a defendant's allegedly wrongful conduct violated clearly established law." (*Id.* at 1163). Also, the Eleventh Circuit specifically stated in *Zeigler v. Jackson*, 716 F. 2d 847 (11th Cir. 1983): "In order to show that a defendant exercising broad discretionary power lacked good faith, plaintiff must prove that the defendant's actions violated clearly established constitutional law." (*Id.* at 849). Finally, this Court stated in *Harlow v. Fitzgerald*, supra: "summary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred." (*Id.* at 413).[1] It is on the non-application of this requirement that the decision below departs from the decisions of all other courts which have addressed the issue.

Regarding the first of the respondent's two allegations of constitutional violations — his claim of a right to a "pre-

[1]On this point see also *Procunier v. Navarette*, 434 U. S. 555, 562, 98 S. Ct. 855, 859, 55 L. Ed. 2d 24 (1978); *Wood v. Strickland*, 420 U. S. 308, 322, 95 S. Ct. 992, 1000, 43 L. Ed. 2d 214 (1975).

determination" hearing [illegible] is clear that respondent did not meet his burden of proof. Respondent made absolutely no mention of his due process allegation in his responsive affidavits. The Eleventh Circuit completely ignored the specific holdings of this Court and the circuit courts concerning a plaintiff's burden of proving specific constitutional violations to rebut a defendant's entitlement to summary judgment on qualified immunity grounds. Moreover, the Eleventh Circuit below held that respondent's bare "claim" that the petitioners failed to provide him with a pre-termination hearing raised a material issue of fact as to whether there had been a violation of his due process rights. Such clearly could not be the case.

As an initial matter, respondent never claimed that he did not receive a "pre-termination" hearing, but rather his claim was that he had not received a "pre-determination" hearing. If such were the holdings of this Court, no tenured teacher could ever be terminated. It would be impossible to afford an administrative hearing to a teacher prior to the decision or determination by the administration to advise the teacher of his proposed termination. Only after that decision has been made and the teacher has been notified is he or she entitled to an administration hearing. That is precisely what happened in this matter. Respondent was notified in writing on May 6, 1982, that the university proposed to terminate him prospectively approximately seven weeks in the future, on June 30, 1982, subject to his right to an administrative hearing. As the Third Circuit Court of Appeals held in *Chung v. Park*, 514 F. 2d 382 (3rd Cir. 1975) and this Court held in *Perry v. Sindermann*, 408 U.S. 593 (1972), a post-decision hearing is appropriate.[2]

The Eleventh Circuit's opinion held the respondent was entitled not merely to a "name-clearing" hearing, but to a legitimate opportunity to contest the deprivation of his property. Petitioners

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[2]The Third Circuit in *Chung v. Park*, supra, stated at pages 386-387: "To determine what due process is due we have reviewed the guidelines enunciated in *Morrisey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), but have found nothing in these cases which suggest that (the teacher) was entitled to have a hearing prior to a decision by the college to terminate. . ."

recognize this Court has repeatedly stressed that as a basis for its due process guidelines there can be no deprivation of a tenured teacher's property in relation to an administrative hearing. Here, there could not have been any deprivation of respondent's property and the Eleventh Circuit's conclusion has no basis in the record. The respondent was notified that his proposed termination would be June 30, 1982, since that was the last day of his and every other faculty member's term of employment for the 1981-1982 academic year. Neither respondent nor any other faculty member could have received any salary or benefits from June 30, 1982, until the beginning of the fall quarter in September, 1982. Therefore, there was not nor could there have been a deprivation of respondent's property right from the date of his proposed termination on June 30 until the date of his final notification of termination on August 31, 1982, as he was not deprived of any benefits during that period. Respondent's hearing was scheduled on the last day of his employment term and continued into July, after his term of employment had ended. He received a hearing and a written decision before he was deprived of any significant property interest.

It is also clear that respondent received much more that a "name-clearing" hearing, and it should be noted that the respondent has never contended that he only received a "name-clearing" hearing. In fact, the record amply shows that the respondent received a full-fledged hearing in connection with his proposed termination. He was advised in writing of all particulars concerning the reasons for his proposed termination, including an explanation of the petitioners' evidence. He was also notified in writing of the details of the conduct of his hearing, including the names of the members of the Committee and that he could challenge any member for good cause (R. 547-548). At his request, the hearing was rescheduled from June 30 until July 7, 1982 (R. 549). The Faculty Personnel Advisory Committee heard approximately 55 hours of sworn testimony with documents introduced from both parties. Respondent was represented by his attorney and another representative, called witnesses in his own behalf and cross-examined all other witnesses (R. 269-270, 272, 273, 289, 359-360, 478-479, 502). Over 1200 pages of sworn testimony was transcribed by a court reporter at the respondent's request and the hearing was tape recorded. The Committee, at the convenience of all parties, scheduled hearing times from July 7 until July 29, 1982. The Committee delivered

to respondent its written decision on August 3, 1982 (R. 550). Respondent received the full panoply of procedural safeguards in his administrative hearing, as he received ample notice and a full opportunity to respond. The respondent's hearing was scheduled at a meaningful time, originally on June 30, 1982. Any delay in concluding the hearing stemmed from the thoroughness of the procedures.

With regard to his freedom of expression allegation, respondent likewise failed to meet the burden specifically required by this Court and the Fifth and Eleventh Circuit Courts. The Eleventh Circuit held, as to petitioner Paul, that the doctrine enunciated by this Court in *Mt. Healthy Board of Education v. Doyle,* 429 U. S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) did not control, because it sustains a termination based on impermissible reasons only when there are other reasons sufficient to support the decision. In reaching this decision, the Eleventh Circuit necessarily concluded that at least some of the reasons given respondent for his proposed termination involved his constitutional rights. However, the lower court again overlooked this Court's specific requirement that the respondent must actually prove a violation of his constitutional rights to overcome a properly supported motion for summary judgment on the grounds of qualified immunity, which he wholly failed to do. Since the respondent did not even attempt to meet his burden, the court below should not have reached or based any portion of its decision on the *Mt. Healthy* doctrine. Regarding the remaining petitioners, the Eleventh Circuit held that there was the "possibility of" or "potential for" a First Amendment violation. There is no basis of support for this conclusion contained anywhere in the record, other than respondent's bare allegations in his complaint. Respondent offered no admissible proof of any violation by any of the petitioners of his right to freedom of expression. That respondent was unable to make this required showing below is evident in the trial court's specific holding that respondent had failed to offer any proof on this issue in his affidavit. In essence, then, the Eleventh Circuit's reversal amounts to a holding that respondent's constitutional rights were violated solely because he raised those allegations in his complaint.

The court below reversed as to the petitioners in their individual capacity. However, according to *United Carolina Bank v. Board*

of Regents, supra, "(s)tate officials, such as the defendants here, enjoy a qualified immunity when sued for damages in their individual capacity under Section 1983" (*Id.* at 562). Also, numerous Alabama cases[3] construing the Alabama Constitution have held the prohibition of Article I, Section 14 cannot be circumvented by suing the official or agent individually.[4]

The Eleventh Circuit's opinion is clearly in conflict with the decisions of this Court and the Fifth and Eleventh Circuit Courts of Appeal. This opinion is a dangerous precedent that seriously threatens the efficient operation and administration of all institutions of higher education in this country. As this Court stated in *Wood v. Strickland,* 420 U. S. 308, 326, 95 S. Ct. 992, 43 L. Ed. 214 (1975), "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion . . . The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators. . . and Section 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees." This is, however, exactly what has been done by the lower court. Its reversal ignored the petitioners' properly supported entitlement to qualified immunity and raised the respondent's bare complaint allegations to the level of proven violations of specific constitutional guarantees in the absence of any proof whatsoever that such actually occurred. If allowed to stand, this decision would result in administrators in the educational community in the United States severely limiting or abandoning the exercise of their discretion and judgment, since bare allegations of constitutional violations would, without more, in every instance subject them to the costs and burdens of trial. The better reasoned approach is for summary judgment to be readily available, as the court stated in *Harlow v. Fitzgerald,* supra, whenever the plaintiff cannot

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[3]*Milton v. Espey,* 356 So. 2d 1201, 1202 (Ala. 1978); *Carter v. Forrester,* 395 So. 2d 63 (Ala. Civ. App. 1980); *Wallace v. Malone,* 279 Ala. 93, 182 So. 2d 360 (1964); *State Docks Commission v. Barnes,* 225 Ala. 403, 143 So. 581 (1932).

[4]"That the State of Alabama shall never be made a defendant in any court of law or equity." Constitution of Alabama 1901, Article 1, Section 14.

prove, as a threshold matter, that a violation of his constitutional rights actually occurred.

II. DOES THE DECISION OF THE ELEVENTH CIRCUIT VIOLATE ITS OWN ORDER BY BASING ITS DECISION ON ISSUES NOT ARGUED IN RESPONDENT'S BRIEF?

On July 9, 1984, the Eleventh Circuit entered an Order in this appeal stating that respondent had abandoned all issues not argued in his brief and that petitioners would not have to respond to those abandoned issues. A copy of that Order is included as Appendix F. Despite this Order on which the petitioners relied, the Eleventh Circuit based its reversal specifically on issues not argued in respondent's brief, and which therefore were not before that court for review.

The respondent included no argument in brief regarding his due process allegation. The only mention in brief of the respondent's administrative hearing and therefore his due process rights was on page four of his Statement of the Case wherein he restated the seven allegations contained in his amended complaint, and on page 12 of his Statement of the Facts, in which he again restated the allegations which were in his complaint. The Court of Appeals reversed in part because of, in its words, respondent's "claim" that he was entitled to a pre-termination hearing and his "suggestion" that the hearing did not conform to the requirements of due process. That is exactly what respondent "claimed" and "suggested" in his Statement of the Case, but which was nothing more than a summary of the complaint allegations. Neither did respondent argue or even mention any deprivation of his property in brief, even though this was the basis of the lower court's reversal on this issue. As pointed out above, there was not and there could not have been any deprivation of respondent's property in connection with his administrative hearing. Having elected not to present the court below with any argument on this issue, it is clear that the court's Order of July 9, 1984, precluded any consideration of that abandoned issue.

The other ground for reversal was the Eleventh Circuit's holding that there was a "potential" for a First Amendment violation in

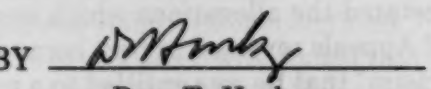
connection with respondent's termination. Other than simply quoting in brief the district court's opinion regarding his First Amendment rights, the respondent did not argue and therefore did not raise for review the issue of a violation of this constitutional right. The court below therefore incorrectly based this part of its opinion on this abandoned issue.

The issue is, simply, whether the lower court was itself bound by its own Order, since its opinion implies that its own Order had no binding effect. Indeed, the Eleventh Circuit's opinion is irreconcilably in conflict with its own Order. This conflict and the right of litigants to rely upon a court's own orders justify the grant of certiorari to review the correctness of the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

BY 

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September 20, 1985

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

(Filed September 27, 1983, Thomas C. Caver, Clerk)

T. DEWEY HARDEN, JR., Plaintiff,	)	
v.	)	CIVIL ACTION NO.
RALPH W. ADAMS, Etc.; ET AL, Defendants.	)	82-453-N

O R D E R

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the motion for summary judgment filed herein July 6, 1983, by Defendants Grimmer, Thornton and Kirkland be, and the same is hereby, granted, and J. Wyatt Grimmer, William T. Thornton and Marjorie C. Kirkland are hereby dismissed as party Defendants to this cause of action.

DONE this 27th day of September, 1983.

/s/ R. E. Varner

United States District Judge

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

(Filed September 27, 1983, Thomas C. Caver, Clerk)

T. DEWEY HARDEN, JR., Plaintiff,	)	
v.	)	CIVIL ACTION NO.
RALPH W. ADAMS, Etc.; ET AL, Defendants.	)	82-453-N

OPINION

This cause is now before the Court on the motion for summary judgment filed herein by Defendants Kirkland, Grimmer and Thornton. Upon consideration of the motion, and of other relevant materials, this Court is of the opinion that the motion should be granted.

Plaintiff Harden was employed as a tenured professor at the Dothan/Ft. Rucker branch campus of Troy State University. On

May 6, 1982, Plaintiff was notified by Defendant Paul, Chief Executive Officer of Troy State University at Dothan/Ft. Rucker, that Plaintiff's employment would be terminated. Plaintiff was granted a hearing on his termination before the Faculty Personnel Advisory Committee. On the recommendations and findings of the Committee, Defendant Paul notified Plaintiff that Plaintiff's termination would be effective June 30, 1982. Plaintiff brought an action for damages under 42 U.S.C., Section 1983, claiming that, in terminating his employment, the Defendants violated Plaintiff's rights under the first, Fifth and Fourteenth Amendments to the United States Constitution. Defendants Kirkland, Grimmer and Thornton are alleged to have made false charges against Plaintiff "which eventually led to the effort to terminate his employment." Defendants Kirkland, Grimmer and Thornton request that judgment be entered for them as a matter of law.

The Eleventh Amendment to the United States Constitution has been held to bar an action in federal court against a State or State agency unless the State has consented to suit. See, Alabama v. Pugh, 438 U.S. 781 (1978). The Eleventh Amendment bars suits, not only against the State when it is a named party, but also when it is the real party in fact. Scheuer v. Rhodes, 416 U.S. 232 (1974). Whether the State is a real party in fact depends upon the law of the State in question. A university of higher education such as Troy State University is an agency of the State of Alabama and immune from suit. Massler v. Troy State University, 343 So.2d 1 (Ala. 1977). Furthermore, suits against officials of a State agency, which if decided in favor of the plaintiff would directly affect a contract or property right of the State, are also barred. Carter v. Forester, 395 So.2d 63 (Ala. Civ. App. 1980). These Defendants are undisputably officials of Troy State University. A judgment against them in their official

capacities would necessarily result in payment from the State treasury. Thus, a suit against them is a suit against the State of Alabama. See, Edelman v. Jordan, 415 U.S. 651 (1974).

The immunity afforded school officials is not absolute but is qualified. In Wood v. Strickland, the United States Supreme Court declared:

> "We think there must be a degree of immunity if the work of the school is to go forward; and, however worded the immunity must be such that public school officials understand that action taken in the good-faith fulfilment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." Wood v. Strickland, supra at 321.

In further defining the scope of the qualified immunity afforded both federal and State officials, the Supreme Court held in Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982), that government officials performing discretionary functions generally are shielded from liability for civil damages unless their conduct violates clearly established statutory

or constitutional rights of which a reasonable person would have known. Thus, if an official's conduct is decidedly objectively reasonable as measured by reference to clearly established law, a claim based on that conduct may properly be disposed of on summary judgment. See, Harlow supra.

Each of these Defendants are charged with making false statements about Plaintiff which led to the efforts to terminate Plaintiff's employment as a tenured professor at Troy State University. Defendant Grimmer, Dean of Academic Affairs at Troy State, attests that he received a number of complaints about Dr. Harden which led to Dean Grimmer's concurring in a recommendation with Kirkland and Thornton that Dr. Harden's employment be terminated. He further attests that it is his responsibility as Dean of Academic Affairs to either concur or not concur in a recommendation to terminate a faculty member and that, in carrying out that duty in this case, he acted in good faith and with no ill

will or malice toward Dr. Harden.

Defendant Thornton, formerly the Dean of Student Services of Troy State, attests that he received a number of complaints about Dr. Harden's sponsorship of a student organization, Gamma Beta Phi, and that further investigation showed that Dr. Harden had failed to follow school policies and had improperly handled his sponsorship of the organization. Defendant Thornton's responsibilities include overseeing activities in relation to student organizations. In performing that duty, Defendant Thornton attests that he found serious fault with Dr. Harden's conduct with respect to his involvement with student organizations and other areas which led to Defendant Thornton's recommendation of termination.

Defendant kirkland, Dean of the School of Education and Psychology of Troy State, attests that she received numerous complaints, written and verbal, about Dr. Harden, some of which in her opinion were improper, unethical

and professionally unacceptable for a tenured faculty member. She attests that, on the basis of the complaints and surrounding circumstances, she had a good faith reasonable belief that Dr. Harden should be terminated as a professor. She made such a recommendation to the President of the University. One reason for her recommendation was that she heard that Dr. Harden had engaged in sexual relations with one of his students.

Dr. Harden responds to the affidavits against him with his own affidavit wherein he makes little showing to indicate that any of the statements made against him were false. Instead, he argues his case by stating that Defendants acted only on rumors which, even if true, were not good reasons to have him terminated. Specifically, with respect to the charges of sexual misconduct, Dr. Harden asserts that the charges were falsely made because, even though he, in fact, had relations with a student, Defendants had no knowledge of that conduct when they made their

recommendations. The only conclusion that can be reached from this unusual argument is that the Defendants' charge was not false.

These Defendants did nothing more than express their belief that Dr. Harden should not continue as a professor. They did not personally terminate the Plaintiff, nor did they attempt to prevent Plaintiff from responding to the charges. In fact, an administrative hearing was held before the Faculty Personnel Advisory Committee wherein Dr. Harden was given an opportunity to prove that the charges against him were false and/or that there was not good cause to terminate his employment.

Upon review of the motion for summary judgment and all materials submitted in support and opposition thereto, it is this Court's opinion that the recommendations made by each of these Defendants were made in the good faith fulfillment of their responsibilities and were reasonable and did not violate any clearly established statutory

or constitutional right of which a reasonable person would know. Therefore, this Court feels that judgment should be entered as a matter of law in favor of Defendants Grimmer, Thornton and Kirkland.

An Order will be entered in accordance with this Opinion.

DONE this 27th day of September, 1983.

/s/ R. E. Varner

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

(Filed March 19, 1984, Thomas C. Caver, Clerk)

T. DEWEY HARDEN, JR.,

Plaintiff,

v. CIVIL ACTION NO.

RALPH W. ADAMS, Etc.; 82-453-N

ET AL,

Defendants.

O R D E R

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that Defendants Adams' and Paul's motions for summary judgment filed herein January 12, 1984, and February 16, 1984, are hereby granted.

Defendants Adams and Paul being the only remaining Defendants in this cause, it is further ORDERED by this Court that this cause is hereby dismissed with costs taxed against

the Plaintiff, for which execution may issue.

It is further ORDERED by this Court that the motion filed herein March 12, 1984, to shorten time and the Plaintiff's objections thereto filed herein March 12, 1984, are hereby dismissed as moot.

DONE this 19th day of March, 1984.

/s/ R. E. Varner

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

(Filed March 19, 1984, Thomas C. Caver, Clerk)

T. DEWEY HARDEN, JR.,

Plaintiff,

v. CIVIL ACTION NO.

RALPH W. ADAMS, Etc.; 82-453-N

ET AL,

Defendants.

OPINION

This cause is now before the Court on Defendants Adams' and Paul's motions for summary judgment filed herein January 12, 1984, and February 16, 1984. Upon consideration of the motions, of the affidavits in support of and in opposition to the motions and of other relevant materials, this Court is of the opinion that the motions are due to be granted.

Plaintiff, T. Dewey Harden, Jr., was

employed as a tenured professor at the Dothan/Ft. Rucker branch campus of Troy State University. On May 6, 1982, Plaintiff was notified by Defendant Paul, Chief Executive Officer of Troy State University at Dothan/Ft. Rucker, that Plaintiff's employment would be terminated. Plaintiff was granted a hearing on his termination before the Faculty Personnel Advisory Committee. On the recommendations and findings of the Committee, Defendant Paul notified Plaintiff that Plaintiff's termination would be effective June 30, 1982. Plaintiff brought an action for damages under 42 U.S.C., Section 1983, claiming that the Defendants violated Plaintiff's right under the First, Fifth and Fourteenth Amendments to the United States Constitution. Defendants Adams and Paul have requested that judgment be entered for them as a matter of law.

In support of his motion, Defendant Adams argues that this suit cannot be maintained against him because of the State of Alabama's

immunity under the Eleventh Amendment to the United States Constitution and because of his qualified immunity. The Eleventh Amendment to the United States Constitution has been held to bar an action in federal court against a State or State agency unless the State has consented to suit. See Alabama v. Pugh, 438 U.S. 781 (1978). The Eleventh Amendment bars suits, not only against the State when it is a named party, but also when it is the real party in fact. Scheuer v. Rhodes, 416 U.S. 232 (1974). Whether the State is a real party in fact depends upon the law of the State in question. A university of higher education, such as Troy State University, is an agency of the State of Alabama and is immune from suit. Massler v. Troy State University, 343 So.2d 1 (Ala. 1977). Furthermore, suits against officials of a State agency which, if decided in favor of a plaintiff would directly effect a contract or property right of the State, are barred also. Carter v. Forester, 395 So.2d 63 (Ala. Civ. App. 1980). Defendant Adams is

being sued individually and in his official capacity as President of Troy State University. A judgment against him in his official capacity would necessariiy result in payment from the State treasury. Thus, a suit against Defendant Adams is a suit against the State of Alabama. See, Edelman v. Jordan, 415 U.S. 651 (1974).

The immunity afforded school officials is not absolute but is qualified. In Wood v. Strickland, 420 U.S. 308 (1975), the United States Supreme Court declared:

> "We think there must be a degree of immunity if the work of the school is to go forward; and, however worded the immunity must be such that public school officials understand that action taken in the good-faith fulfilment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." Wood v. Strickland, supra at 321.

In further defining the scope of the qualified immunity afforded from both federal and State officials, the Supreme Court held in Harlow v. Fitzgerald, 457 U.S. 800 (1982), that

government officials performing discretionary functions generally are shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Thus, if an official's conduct is decidedly objectively reasonable as measured by reference to clearly established law, a claim based on that conduct may properly be disposed of on summary judgment. See, Harlow supra.

The Plaintiff contends that Defendant Adams violated Plaintiff's rights under the First, Fifth and Fourteenth Amendments of the United States Constitution. Plaintiff alleges that his administrative hearing before the Faculty Personnel Advisory Committee did not comply with the requirements of due process and that his termination was a violation of his First Amendment right to freedom of speech and expression. Defendant Adams attested that he did not participate in any form or manner with the termination of the Plaintiff, nor did

he have any knowledge of the particulars leading up to the Plaintiff's termination. Furthermore, Defendant Adams attested that he delegated the authority to employ, to promote and to terminate members of the faculty at the Dothan/Ft. Rucker branch campus to Defendant Paul. That authority was originally vested in Defendant Adams by the Board of Trustees. (See Affidavits of individual Board Members filed January 12, 1984, in support of Defendant Adams' Motion for Summary Judgment).

Defendant Paul attested in his affidavit that Defendant Adams told Mr. Paul that Mr. Paul had the authority to terminate faculty members at the Dothan/Ft. Rucker branch campus. On May 6, 1982, Mr. Paul did, in fact, notify the Plaintiff that Plaintiff's employment would be terminated. In addition, Mr. Paul attested that Defendant Adams had no connection with the Plaintiff's administrative hearing and, to Mr. Paul's knowledge, did not know the names of the committee members.

Plaintiff responds to the affidavits

against him with his own affidavit. He attests that Defendant Adams had knowledge of the fact that Plaintiff's constitutional rights were being violated. In addition, he states that he met with Adams on several occasions concerning this matter. Plaintiff makes no showing in his affidavit that Defendant Adams violated his constitutional rights. Defendant Adams had no connection with Plaintiff's termination or with his administrative hearing. Defendant Adams only listened to several of Plaintiff's complaints on several occasions.

It appears to this Court that Plaintiff has failed to present any evidence to show that Defendant Adams violated Plaintiff's constitutional rights. Accordingly, this Court is of the opinion that there is no genuine issue of material fact concerning Plaintiff's claims against Defendant Adams and that summary judgment should be granted in favor of Defendant Adams.

On May 6, 1982, Defendant Paul sent

Plaintiff a memo advising Plaintiff that his employment with Troy State University at Dothan/Ft. Rucker was being terminated. (See Exhibit 6 to Defendant Paul's Motion for Summary Judgment). In said memo, Defendant Paul listed 20 charges lodged against the Plaintiff. Of these 20 charges, seven relate to Plaintiff's First Amendment rights to the United States Constitution. Plaintiff has denied five of the seven charges relating to First Amendment rights and has denied only one of the 13 charges not related to Plaintiff's First Amendment rights. The record, therefore, shows statutory admission of 12 of the 13 valid reasons for discharge. The charges against the Plaintiff, which he has not denied and which are not related to his First Amendment rights, are:

1. Making or attempting to make extra charges or expenses to students other than those fees listed in the quarterly schedule.

2. Failure to keep adequate or required office hours.

3. Failure to keep appointments with students.

4. Failure to submit course outlines as required.

5. Failure to teach the course material as set out in the course outline.

6. Failure to teach the course material adequately.

7. Continually bringing or requesting that food be brought into the classroom with students after being requested not to do so.

8. Requiring personal information and pictures from students after being requested not to do so.

9. Grievances from students regarding professional duties.

10. Failure to follow established procedure for changing of grade.

11. Advising students of improper procedure for changing a grade.

12. Failure to follow established procedures by notifying students of grades given by another professor.

The Plaintiff was not abiding by the policies and procedures of the University. Among other things, he charged students extra expenses, other than those fees listed in the quarterly schedule. Plaintiff could not be depended upon to keep regular office hours or to keep appointments. In addition, Plaintiff failed to submit course outlines, failed to properly teach his courses and failed to change grades correctly. Against University policy, Plaintiff asked that food be brought into the classroom and asked for personal information and pictures from students.

It appears to this Court that Defendant Paul had at least 12 valid reasons for which to terminate Plaintiff. Furthermore, Plaintiff did not contest these 12 charges. Therefore, this Court is of the opinion that Plaintiff would have been discharged independent of the charges which allegedly violated Plaintiff's First Amendment rights.[1/]

Accordingly, this Court is of the opinion that there is no genuine issue of material

fact and that summary judgment should be granted in favor of Defendant Paul.

An Order will be entered in accordance with this Opinion.

DONE this 19th day of March, 1985.

/s/ R. E. Varner

UNITED STATES DISTRICT JUDGE

1/ Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977).

APPENDIX C

T. DEWEY HARDEN, JR.,

Plaintiff-Appellant,

v.

Ralph ADAMS, individually and as President of Troy State University, et al.,

Defendants-Appellees.

No. 84-7243.

United States Court of Appeals,

Eleventh Circuit

May 20, 1985

Tenured faculty member brought action against university and university officials for violation of his First and Fourteenth Amendment rights in connection with his termination by university. The United States District Court for the Middle District of Alabama, Robert E. Varner, J,. granted summary judgment in favor of all defendants, and faculty member appealed. The Court of Appeals, Johnson, Circuit Judge, held that:

(1) university, its board of trustees, and individual university officials in their official capacities were entitled to sovereign immunity; (2) university president and members of the board of trustees were entitled to good-faith immunity in their individual capacities; (3) genuine issue of fact was raised as to whether permissible reasons cited for faculty member's termination were sufficient to support decision, thereby precluding summary judgment in favor of university vice-president on ground that he was entitled to good-faith immunity; and (4) genuine issue of fact was raised as to whether university deans, who reported negative information and recommended the termination of faculty member, violated his constitutional rights, thereby precluding summary judgment in their favor on ground that they were entitled to good-faith immunity.

Affirmed in part and reversed and remanded in part.

1. Federal Courts

269, 270

Rule that Eleventh Amendment bars suits by private parties seeking to impose liability which must be paid from public funds in the state treasury applies whether the action is instituted against a state, a state agency or instrumentality, or a state official. U.S.C.A. Const.Amend. 11.

2. Federal Courts

269, 418

In determining whether Eleventh Amendment bars a suit, the critical inquiry is whether the entity sued can be considered an agency or instrumentality of the state; this inquiry is generally conducted by reference to state law. U.S.C.A. Const.Amend. 11.

3. Federal Courts

269, 270

Factors that bear on determination whether for Eleventh Amendment purposes the entity sued can be considered an agency or instrumentality of the state include the definition of state and political subdivision,

the degree of state control over the entity, and the fiscal autonomy of the entity. U.S.C.A. Const.Amend. 11.

4. Federal Courts

269

Where budget of an entity is submitted to the state for approval, that suggests that the entity is an agency of the state for purposes of the Eleventh Amendment. U.S.C.A. Const.Amend. 11.

5. Federal Courts

269

Where university's board of trustees, which reported to the state legislature yearly on condition of university, was composed in part of state officials and in part of gubernatorial appointees, and university must submit its budget to, and receive appropriations from, the state legislature, it was an agency or instrumentality of the state for Eleventh Amendment purposes. U.S.C.A. Const.Amend. 11.

6. States

191(2)

Trustees of a state university are entitled to sovereign immunity as an instrumentality of the state. U.S.C.A. Const.Amend. 11.

7. States

191(2)

Where university insurance policy which terminated faculty member initially identified as a potential source of funds specifically excluded payments for type of damages he claimed and, moreover, he had identified no other fund which could be used for the payment of damages, he could not avoid finding of sovereign immunity on ground that funds used to provide relief in his suit need not come from the state treasury. U.S.C.A. Const.Amend. 11.

8. States

191(2)

University, its board of trustees, and individual members of board in their official capacities were entitled to sovereign immunity

in terminated faculty member's section 1983 action, in that university was an agency or instrumentality of the state. U.S.C.A. Const.Amend. 11.

9. Civil rights

13.8(2)

University president and members of university's board of trustees in their individual capacities were entitled to good-faith or qualified immunity in terminated faculty member's section 1983 action, in that there was no evidence to suggest that any of those individual played a role in bringing charges against faculty member, deciding to terminate him or conducting the hearing following his termination notice. U.S.C.A. Const.Amend. 11.

10. Federal Courts

269

State officials acting in their individual capacities are not protected by the sovereign immunity conferred by Eleventh Amendment; however, they may be immunized

against legal action if the challenged action was undertaken in good faith and was within the discretion conferred upon them by their employment. U.S.C.A. Const.Amend. 11.

11. Officers and Public Employees

114

Government officials are shielded from liability for civil damages if their conduct was within the discretion conferred by their employment and did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

12. Civil Rights

13.4(1)

Reliance on impermissible factors does not, in and of itself, render a termination decision unconstitutional, if there were other, permissible reasons for the termination which were sufficient to support the decision.

13. Civil Rights

13.4(1)

Doctrine providing that reliance on impermissible factors does not, in and of

itself, render a termination decision unconstitutional, if there were other, permissible reasons for the termination which were sufficient to support the decision does not apply in every case where officials can demonstrate other reasons for a termination; it sustains a termination based on impermissible reasons only when there are other reasons sufficient to support the decision.

14. Federal Civil Procedure

2497

In section 1983 action brought by tenured faculty member for violation of his First and Fourteenth Amendment rights in connection with his termination by university, material issue of fact was raised as to whether the permissible reasons cited for his termination were sufficient to support decision, thereby precluding summary judgment in favor of university vice-president on ground that he was entitled to good-faith or qualified immunity. U.S.C.A. Const.Amends. 1, 14; 42

U.S.C.A. Section 1983.

15. Federal Civil Procedure

2497

In tenured faculty member's section 1983 action brought for violation of First and Fourteenth Amendment rights in connection with his termination by university, genuine issue of fact was raised as to whether university deans, who reported negative information and recommended termination of faculty member, had violated faculty member's constitutional rights, thereby precluding summary judgment in their favor on ground that they were entitled to good-faith or qualified immunity. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. Section 1983.

16. Constitutional Law

255(1), 278(1.1)

Before an individual is deprived of a protected interest, he must be afforded opportunity for some kind of hearing, except in those extraordinary circumstances where some valid governmental interest justifies postponing the hearing until after deprivation

takes place.

17. Colleges and Universities

8.1(2)

When a faculty member at a university is granted tenure, he acquires a property interest in his employment which is entitled to protection.

18. Colleges and Universities

8.1(5)

Because tenured faculty member had a property interest in his employment, he was entitled not merely to a name-clearing hearing, which could be held at any time, but a legitimate opportunity to contest the deprivation of his property, which must ordinarily be provided before the decision concerning deprivation is made.

19. Federal Civil Procedure

2497

In tenured faculty member's section 1983 action brought in connection with his termination by university, genuine issue of fact was raised as to whether university

vice-president, who was directly responsible for hearing, violated faculty member's due process rights, by failing to hold pretermination hearing, thereby precluding summary judgment in favor of vice-president. U.S.C.A. Const.Amend.14; 42 U.S.C.A. Section 1983.

20. Federal Civil Procedure

1623

District court properly refused to compel production of certain documents sought by tenured faculty member in his section 1983 action brought in connection with his termination by university, in that, although the six items cited by faculty member in his brief were not included, the record suggests that he made no objection to order at the time and, while he explained the relevance of items not included in production order, he did not demonstrate that their exclusion was an abuse of discretion. 42 U.S.C.A Section 1983

21. Federal Civil Procedure

1267

Federal Courts

820

A district court enjoys broad discretion over discovery matters and will be reversed only for abuse of discretion.

22. Federal Civil Procedure

1935

Amendment to pretrial order which restricted jury trial in terminated faculty member's civil rights action to issue of damages was not made without giving faculty member an opportunity to be heard, and did not impermissibly restrict his right to jury trial, in that faculty member's complaint itself requested a jury trial only on the issue of damages and parties stipulated at pretrial conference that a jury would be impaneled only to determine damages, and amendment to pretrial order sought only to include that stipulation, which had been left out of the original order. 42 U.S.C.A. Section 1983; U.S.C.A. Const.Amend. 6.

23. Federal Civil Procedure

2497

Because so many of tenured faculty member's claims in his section 1983 action brought following his termination by university had already been resolved against him on motions for summary judgment, his own motion for summary judgment was properly denied; moreover, the same material issues of fact which militated against district court's decision to grant summary judgment to university vice-president and deans militated against a grant of summary judgment to faculty member. 42 U.S.C.A. Section 1983

Appeal from the United States District Court for the Middle District of Alabama.

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

T. Dewey Harden brought this action under 42 U.S.C.A. Section 1983, for violation of his First and Fourteenth Amendment rights in connection with his termination by Troy State

University. The United States District Court for the Middle District of Alabama granted summary judgment in favor of all defendants. Because the district court erred in finding that four of these defendants were entitled to qualified or "good faith" immunity from the claims raised against them in their individual capacities, we reverse in part. We affirm the grant of summary judgment as to these defendants in their official capacities, and as to all other defendants in both their official and individual capacities.

I. FACTUAL BACKGROUND

T. Dewey Harden was a tenured faculty member at Troy State University. On March 25,1982, University administrators received a written complaint from Harden's Department Chairman concerning derogatory comments that Harden had made about him. This complaint prompted a series of discussions about Harden among University administrators. On May 6, 1982, Robert Paul, Vice-President of the University and Chief Executive Officer of the

Dothan/Ft. Rucker branch of the University, notified Harden that he was terminated as of June 30, 1982. The grounds cited by Paul for the termination were:

1. Unacceptable statements concerning the qualifications of the Chairman of the Department.
2. Making or attempting to make extra charges to students beyond those fees listed in the quarterly schedule.
3. Failure to keep adequate or required office hours.
4. Failure to keep appointments with students.
5. Failure to submit course outlines as required.
6. Failure to teach the course material as set out in the course outline.
7. Failure to teach course material adequately.
8. Continually bringing or requesting that food be brought into the classroom with

so.

9. Requiring personal information and pictures from students, after being requested not to do so.

10. Grievances from students regarding professional duties.

11. Failure to follow established procedure for changing a grade.

12. Advising students improper procedure for changing a grade.

13. Advising students to draft a petition and get the signatures of other students in contravention of University policy.

14. Advising students to draft a petition which was derogatory to the Chairman of the Department.

15. Advising or agreeing the petition be taken to a local newspaper.

16. Failure to follow established procedures by notifying students of grades given by another professor.

17. Fomenting disharmony and dissension

University in the handling and sponsorship of Gamma Beta Phi.

18. Fomenting disharmony with administration of the University in writing letters to faculty, specifically, the March 1, 1982, letter.

19. Alleged sexual impropriety.

20. Making misleading or incorrect statements to the local news media.

On May 14, 1982, Harden responded through his attorney to Ralph Adams, President of Troy State University. He asked to be afforded the administrative remedies available to him, and to have a clarification of the charges against him. On June 8, 1982, Adams advised Harden that he had delegated to Paul all authority to terminate faculty personnel, and administrative remedies would be handled through Paul's office. Unsatisfied by this response, Harden filed suit in the United States District Court for the Middle District of Alabama. On June 17, 1982, the same day

stating that Harden would be granted a hearing before the Faculty Personnel Advisory Committee on June 30, 1982. On June 21, 1982, the Chairman of the Faculty Personnel Committee advised Harden in writing of all of the details of the hearing.

At Harden's request, the hearing was rescheduled for July 7, 1982. Between that date and July 14, 1982, the Committee heard testimony and received documents from both parties. Harden was represented by his attorney and an AEA representative, and was permitted to call and cross-examine witnesses. On August 3, 1982, the Committee delivered its written decision, supporting the termination decision of which Harden had been notified. On August 31, 1982, Paul advised Harden in writing that, based upon the decision and recommendation of the Committee, his termination was final.

A. The Course of Proceedings

On June 17, 1982, Harden filed an action under 42 U.S.C.A. Section 1983, alleging that

his termination from Troy State University violated his right to free speech and due process. The complaint named as defendants Troy State University; Ralph Adams, individually and as President of Troy State; Robert Paul, individually and as Vice-President of Troy State; and the members of the Board of Trustees, in their official and individual capacities. The complaint sought back pay, punitive damages, reinstatement and injunctive relief.

On August 31, 1982, appellees filed their answer to the complaint. They amended their answer on September 10, 1982, adding several grounds of defense. On September 13, 1982, appellant was granted leave to amend, and did amend his complaint, adding as defendants Troy State Deans Grimmer, Thornton and Kirkland, in their official and individual capacities. Appellees answered this amended complaint on October 25, 1982.

A pretrial conference was held on September 1, 1982. An order was issued

pursuant to this hearing on September 3, 1982. This order was amended to limit appellant's right to a jury trial to the issue of damages, and to reserve to the court the right to determine the issue of liability, after appellees filed a motion requesting such limitation.

On November 12, 1982, the members of the Board of Trustees of Troy State University moved for summary judgment. This motion was granted January 14, 1983. On January 28, 1983, Troy State University moved for summary judgment. This motion was granted on March 29, 1983. On July 6, 1983, Grimmer, Kirkland and Thornton moved for summary judgment. Their motion was granted on September 27, 1983. On January 12, 1984, Adams moved for summary judgment. The motion was granted by the trial court on March 19, 1983. On February 16, 1984, the last appellee, Robert Paul, moved for summary judgment. On March 19, 1984, the court granted this motion. In each case appellant was ordered to respond,

and did in fact respond, to appellees' motions.

On March 2, 1984, appellant filed a motion for summary judgment. The court denied this motion seven days later, without opinion and without having required appellees to respond.

Appellant filed his notice of appeal or April 9, 1984.

II. ISSUES AND DISCUSSION

A. Eleventh Amendment Immunity

The district court found that appellant's action against Troy State University, and against each of the appellees in his official capacity, was barred by the Eleventh Amendment. Appellant contests this finding of sovereign immunity on the grounds that Troy State University and the individual appellees who administer it are not "arms" or "agencies" of the state, and that the funds used to provide relief need not come from the state treasury. There is little merit to either of

(1-4) In Edelman v. Jordan, 415 U.S. 651, 663, 94 S. Ct. 1347, 1355, 39 L.Ed. 2d 662 (1974), the Court held that the Eleventh Amendment barred suits by private parties "seeking to impose a liability which must be paid from public funds in the state treasury." This rule applies whether the action is instituted against a state, a state agency or instrumentality, or a state official. Id. In Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978), the Court held that actions for injunctive relief against a state or its instrumentality were also barred by the Eleventh Amendment. Under either standard the critical inquiry is whether the entity sued can be considered an "agency or instrumentality" of the state; this inquiry is generally conducted by reference to state law. Mt. Health Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed. 2d 471 (1977); Sessions v. Rusk State Hospital, 648 F.2d 1066 (5th Cir. 1981). Factors that bear

of "state" and "political subdivision"; the degree of state control over the entity; and the fiscal autonomy of the entity. Fouche v. Jekyll Island-State Park Authority, 713 F. 2d 1518, 1520 (11th Cir. 1983). Where the budget of an entity is submitted to the state for approval, this suggests that the entity is an agency of the state for purposes of the last two factors. Id.

(5, 6) The Alabama Supreme Court has held on at least two occasions that state universities, including Troy State University, are agencies or instrumentalities of the state. See Massler v. Troy State University, 343 So. 2d 1 (Ala. 1977); Ellison v. Abbot, 337 So. 2d 756 (Ala. 1976). Moreover, Troy State University is subject to substantial state control: its Board of Trustees, which reports to the state legislature yearly on the condition of the University, is composed in part of state officials and in part of gubernatorial appointees. Sections 16-56-1 and 16-56-2, Code of Alabama (1975). Troy

State must also submit its budget to, and receive appropriations from, the state legislature. Section 16-56-10, Code of Alabama (1975). The Alabama Supreme Court has also determined that the Board of Trustees of a state university is entitled to sovereign immunity as an instrumentality of the state. See Hutchinson v. Board of Trustees of University of Alabama, 47 Ala. App. 460, 256 So. 2d 279 (1971).

(7, 8) Similarly groundless is appellant's argument that the funds which would be used to satisfy a claim against the University or its officials would not come from the state treasury. The University insurance policy which Harden initially identified as a potential source of funds specifically excludes payments for the type of damages he claims. Moreover, Harden has identified no other fund which could be used for the payment of damages. It is also presumed in this Circuit that where an entity's budget is submitted to state

legislature for approval, the state is responsible for any debts that cannot be paid out of the entity's revenues. See Fouche v. Jekyll Island-State Park Authority, supra, 713 F. 2d at 1521. The district court did not err in granting summary judgment as to Troy State University, its Board of Trustees, and the individual appellees in their official capacities.

B. "Good Faith" Immunity

Appellant's action also named Adams, Paul, Grimmer, Thornton, Kirkland and the members of the Board of Trustees as defendants in their individual capacities. The district court granted summary judgment to these appellees in their individual capacities as well, holding that some appellees had no individual connection with Harden's termination and others were protected by "good faith" or "qualified" immunity. Appellant claims that these conclusions were error.

(9) As to President Adams and the

court does not appear to have erred in granting summary judgment. There is no evidence to suggest that any of these individuals plays a role in bringing charges against Harden, deciding to terminate him or conducting the hearing following his termination notice. The members of the Board of Trustees stated in sworn affidavits that they had no knowledge of Harden or his termination before this action was filed. And President Adams specifically disclaimed any responsibility for the decision in his letter of June 8 to Harden's lawyer. Moreover, in Prebble v. Broderick, 535 F. 2d 605 (10th Cir. 1976), the Tenth Circuit held that university trustees were not individually liable under Section 1983 where there was no evidence that they had taken part in the termination of a faculty member, though they had been informed of it.

As to the other appellees, there is little question of their direct participation. Grimmer, Thornton and Kirkland, all deans at

Troy State University, conveyed grievances from other members of the university community, deliberated on those complaints that had been received and recommended to Vice-President Paul that Harden be terminated. Paul was responsible for the ultimate decision and for the conduct of th subsequent hearing. The district court's determination that these appellees were nonetheless protected from individual liability by qualified or "good faith" immunity requires closer consideration.

(10, 11) State officials acting in their individual capacities are not protected by the sovereign immunity conferred by the Eleventh Amendment. They may, however, be immunized against legal action if the challenged action was undertaken in good faith and was within the discretion conferred upon them by their employment. Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed. 2d 90 (1974). In Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed. 2d 396 (1982), the Supreme Court addressed the interpretive difficulties

caused by a subjective standard of "good faith," and the need to facilitate summary disposition of specious actions, by establishing an "objective" standard of immunity. Under this standard, government officials are shielded from liability for civil damages if their conduct was within the discretion conferred by their employment and did not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S.Ct. at 2738. See also Zeigler v Jackson, 716 F.2d 847 (11th Cir. 1983) (applying Harlow v. Fitzgerald standard).

Appellant's challenge to the district court's decision focuses on the second part of the Harlow standard.[1] He argues that the

1. Appellant argues that appellee Adams did not have the power to delegate his authority of termination of faculty to appellee Paul, a claim which would seem to go to the question of whether Paul was acting within the discretion conferred upon him by his employment in terminating Harden. But the cases cited by appellant concern public school teachers and state

district court erred in finding that appellees' conduct was immunized, because it violated "clearly established . . . constitutional rights of which a reasonable person would have known." Appellant claims that this termination for seven reasons relating to his criticism of his Department Chairman violates the First Amendment, and that the University's failure to grant him a pre-termination hearing violates the due process guarantee of the Fourteenth Amendment. In granting summary judgment for appellees in their individual capacities, the district court found that there was "no material issue of fact" as to either constitutional claim.

1. Violation of First Amendment

(12) The Supreme Court has held that a

merit employees; he points to no authority which concerns the power of the President of Troy State University to delegate the authority to terminate faculty members to the Vice-President or the Chief Executive Officer of a particular campus. There is, moreover, nothing in that portion of the Alabama Code relating to Troy State University which suggests that such delegation is

teacher's criticism of his superiors on matters of public concern is protected by the First Amendment and may therefore be an impermissible basis for termination of his employment. Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968). Yet reliance on impermissible factors does not, in and of itself, render a termination decision unconstitutional, if there were other, permissible reasons for the termination which were sufficient to support the decision. Mt. Healthy Board of Education v. Doyle, supra, 429 U.S. at 285-86, 97 S.Ct. at 575.

a. Vice-President Paul

The district court relied heavily on the Mt. Healthy doctrine in finding that Paul's role in the termination did not violate appellant's rights. The court acknowledged the possibility that several of the factors relating to Harden's criticism of the Department Chairman and relied upon to support

the termination of Harden were "impermissible," but concluded that there were also thirteen permissible reasons for termination, twelve of which were "not contested" by appellant.

(13, 14) The district court erred in concluding that the Mt. Healthy doctrine controlled the instant case. First, that doctrine is narrower than the district court's opinion suggests. The Mt. Healthy doctrine does not apply in every case where officials can demonstrate other reasons for a termination; it sustains a termination based on impermissible reasons only when there are other reasons sufficient to support the decision. Second, Mt. Healthy is distinguishable from the instant case in that the appellant there did not have tenure, a fact on which the Court explicitly relied in reaching its decision. To demonstrate reasons sufficient to support the termination of a tenured faculty member, a university would have to make a considerably stronger showing

than appellees did in Mt. Healthy. Paul has made no such showing in the instant case. Many of the stated reasons for termination were seemingly trivial (bringing food to class, not following course outlines, failing to keep appointments with students); others were equivocally maintained by the University (the charge of sexual impropriety was raised, disclaimed at the hearing, and re-raised in the district court); and all were denied by appellant during the district court proceedings. It is impossible to say, viewing all of these allegations in the light most favorable to the non-movant (Harden)[2] that there was no material issue of fact as to whether the permissible reasons cited for his termination were sufficient to support the decision. This conclusion is supported by the

2. A court reviewing a grant of summary judgment must determine whether the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact, when all the evidence is viewed in the light most favorable to the non-moving party. Sweat v. Miller Brewing Co., 708 F. 2d 655 (11th Cir. 1983).

strong policy reflected in the decisions of the Supreme Court and this Circuit against resolving complex First Amendment issues on a motion for summary judgment. See Perry v. Sindermann, supra; Foley v. Alabama State Bar, 648 F.2d 355 (5th Cir. Unit B 1981). For all of these reasons, the district court erred in granting summary judgment to Paul.

b. Deans Grimmer, Thornton and Kirkland

(15) The district court's determination as to Grimmer, Thornton and Kirkland is even less sound; the court failed even to acknowledge the possibility of a First Amendment violation perpetrated by these appellees. The district court stated that these officials were simply doing their duty in reporting negative information and recommending the termination of appellant. Yet the potential for a First Amendment violation existed in their cases as well. Deans Grimmer and Kirkland were directly involved with the communication and investigation of complaints concerning Dr. Harden's criticism of his Department Chairman;

and Dean Thornton provided information suggesting that Dr. Harden had "fomented disharmony" in connection with his sponsorship of Gamma Beta Phi. Moreover, each was fully informed of all charges against Harden, and discussed them at length with the others before recommending to Vice-President Paul that Harden be terminated. Thus the record strongly suggests that these three appellees were intimately involved in a decision to terminate which was based on impermissible factors.[3] As discussed above, it seems

3. Although Grimmer, Thornton and Kirkland made no attempt to claim reliance on the advice of any lawyer, Grimmer states in his affidavit that "Dr. Thornton, Dr. Kirkland and I discussed in detail Dr. Harden's constitutional rights and whether there had been a violation of those rights with the school attorney prior to notifying Dr. Harden of his proposed dismissal." This reference, although vague as to the specific advice which was given, might have been dispositive under a subjective standard of immunity. It is not, however, determinative under the objective standard articulated in Harlow v. Fitzgerald, supra. Harlow states that in determining whether an official violated "established statutory or constitutional rights of which a reasonable person would have known," the court should consider

unlikely that the permissible factors cited by the University were sufficiently strong to bring the case within the Mt. Healthy doctrine. The district court erred in finding that there was no issue of material fact as to whether these appellees violated appellant's constitutional rights.

2. Violation of Due Process

> whether the law in question "was clearly established at the time an action occurred." 457 U.S. at 818 (102 S.Ct. at 2739). Confusion or ambiguity in the law at the time of the action complained of may make a case appropriate for summary judgment in favor of government officials. As the earlier survey of relevant constitutional doctrine suggests, there was no ambiguity in the standards concerning the First Amendment protection afforded faculty members, and the limits on such protection imposed by the Mt. Healthy doctrine. That one lawyer may have been mistaken in his judgment as to how these well-established standards applied to the facts of this case does not change the fact that a reasonable lawyer, or indeed a reasonable person, should have known that Harden had a First Amendment right which was implicated by the University's action. The final determination as to whether, as a matter of fact, the application of the Mt. Healthy doctrine to this case renders appellees immune from suit, should be decided on remand.

Appellant also argues that the hearing which was provided in connection with his termination violated his right to due process. He claims primarily that he was entitled to a pre-termination hearing: the hearing provided by the University was not held until more than two months after he had been notified of his termination. He also suggests that the hearing did not conform to the requirements of due process, as panel members were not impartially selected and were subject to continuing pressure from the university administration.

(16-19) Before an individual is deprived of a protected interest, he must be afforded opportunity for some kind of hearing, except in those extraordinary circumstances where some valid governmental interest justifies postponing the hearing until after the deprivation takes place. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct 780, 28

(1970). When a faculty member at a university is granted tenure, he acquires a property interest in his employment which is entitled to such protection. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Slowchower v. Board of Education, 350 U.S. 551, 76 S. Ct. 637, 100 L.Ed. 692 (1955). The record in this case provides no reason why Dr. Harden should not have been provided with a pre-termination hearing. Because he had a property interest in his employment, he was entitled not merely to a "name-clearing" hearing, which may be held at any time, but a legitimate opportunity to contest the deprivation of his property, which must ordinarily be provided before the decision concerning deprivation is made. See Campbell v. Pierce County, 741 F.2d 1342 (11th Cir. Sept. 18, 1984) (distinguishing between interests requiring "name clearing" hearing and interests requiring pretermination hearing). Although the Supreme Court has held

hold a hearing before the denial of a property right does not violate due process, see Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), appellant's claim that the University failed to provide him with a pre-termination hearing raises, at the very least, a material issue of fact as to whether Vice-President Paul, who was directly responsible for the hearing, violated Dr. Harden's due process rights. Thus with respect to appellant's due process claim as well, the district court erred in granting summary judgment to Vice-President Paul.[4]

C. Other Claims

Appellant raised three procedural claims: he argues that the court erred in refusing to compel production of certain documents; that the pretrial order specifying jury trial on the issue of damages only violated his right

4. Further proceedings on the due process claim should encompass not only the failure to provide a pre-termination hearing, but the alleged procedural irregularity in the hearing which was provided.

to a jury trial; that the court erred in denying his motion for summary judgment. None of these claims has merit.

(20, 21) On February 2, 1982, the district court heard argument on appellant's motion to compel production, and on February 3, 1982, ordered the production of a variety of documents. Although the six items cited by appellant in his brief were not included, the record suggests that appellant made no objection to the order at the time. Moreover, a district court enjoys broad discretion over discovery matters and will be reversed only for abuse of discretion. Salter v. Upjohn Co., 593 F.2d 649 (5th Cir. 1979). While appellant explains the relevance of items not included in the production order, he does not demonstrate that their exclusion was an abuse of discretion.

(22) Harden argues that the amendment to the pretrial order which restricted jury trial to the issue of damages was made without giving him an opportunity to be heard, and

impermissibly restricts his right to jury trial. However, Harden's complaint itself requests a jury trial only "on the issues of damages contained herein." Moreover, appellees note that the parties stipulated at the pretrial conference that a jury would be impaneled only to determine damages, and that amendment to the pretrial order sought only to include that stipulation, which had been left out of the original order. Appellees also note that Harden made no objection either at the time the amendment was made, or on two later occasions when the amended order was included in additional pretrial orders. Finally, on March 1, 1984, Harden filed a joint motion to drop his jury demand which included language stating that, if an appeal were taken and the case remanded, a jury trial should be had on the issue of damages only. It does not appear that appellant's right to a jury trial was restricted.

(23) Appellant filed his motion for summary judgment on March 2, 1984, when all appellees

except appellee Paul had prevailed on motions for summary judgment, and appellee Paul had such a motion before the court. Because so many of Harden's claims had already been resolved against him on motions for summary judgment, it does not appear that the district court erred in denying appellant's motion for summary judgment. Moreover, the same material issues of fact which militate against the district court's decision to grant summary judgment to appellees Grimmer, Thornton, Kirkland and Paul militate against a grant of summary judgment to appellant.

The judgment of the district court as to appellees Paul, Grimmer, Thornton and Kirkland in their individual capacities is REVERSED and REMANDED for further proceedings. The judgment of the district court as to all other appellees in their individual capacities and all appellees in their official capacities is AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-7243

D. C. Docket No. 82-453

T. DEWEY HARDEN, JR.,

Plaintiff-Appellant,

versus

RALPH ADAMS, INDIVIDUALLY AND AS PRESIDENT OF TROY STATE UNIVERSITY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District

of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED and REMANDED to said District Court for further proceedings as to defendants Paul, Grimmer, Thornton and Kirkland in their individual capacities; and AFFIRMED as to all other defendants in their individual capacity and all defendants in their official capacities;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 20, 1985

For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey

Deputy Clerk

ISSUED AS MANDATE: July 3, 1985

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-7243

(Filed June 25, 1985, Spencer D. Mercer, Clerk)

T. DEWEY HARDEN, JR.,

Plaintiff-Appellant,

versus

RALPH ADAMS, et al,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 20, 11 Cir., 1985, ___F.2d ____).

(June 25, 1985)

Before KRAVITCH and JOHNSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Produce; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also denied.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.

United States Circuit Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-7243

(Filed July 9, 1984, Spencer D. Mercer, Clerk)

T. DEWEY HARDEN, JR.,

Plaintiff-Appellant,

versus

RALPH ADAMS, individually and as President of Troy State University; ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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O R D E R:

IT IS ORDERED that appellees' motion for leave to file brief in excess pages, but not to exceed sixty-eight pages is denied. The

appellant has abandoned all issues not argued in his brief, and appellee need not respond to those abandoned issues.

/s/ Thomas A. Clark

United States Circuit Judge